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## DEPARTMENT OF TRANSPORTATION

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### MEMORANDUM

TO: Section 4(f) Practitioners

FROM: FHWA and UDOT 4(f) Working Group

DATE: April 9, 2008

SUBJECT: Section 4(f) Final Rule 23 CFR 774 -- Preparation of Interim Guidance and Required Revisions for Current Section 4(f) documents

On March 12, 2008, the FHWA/FTA published a final rule that updates the Section 4(f) regulations. This rule becomes effective on April 11, 2008. The final rule has been taken out of 23 CFR 771 and codified in 23 CFR 774 and is available at <http://environment.fhwa.dot.gov/projdev/pd5sec4f.asp>.

Although the new regulations incorporate many of the requirements from the old regulations, a number of them have been clarified. There are also some important changes, and additions of requirements that were previously found only in guidance. For example, the process for making *de minimis* impact findings is now included in regulation. There are two changes that most affect how we do Section 4(f) evaluations: the analysis of feasible and prudent avoidance alternatives and the analysis of least overall harm.

The attached Fact Sheet was prepared by FHWA. Please note that there are two corrections that need to be made to this Fact Sheet: page 2, "an alternative is not prudent if ..." (add another bullet: "it does not meet purpose and need"); page 3, for *de minimis* impacts on historic properties, "Administration must receive written concurrence from SHPO, THPO, ACHP in finding of ...". After "ACHP", add "(if participating)".

FHWA will be revising the *Section 4(f) Policy Paper* sometime in the future to incorporate these new rules, but in the meantime FHWA-UT and UDOT are working on developing interim guidance for implementation of the new regulations. Our intent is to revise the UDOT EA Guidelines for the Section 4(f) chapter. This is anticipated to occur in the coming months.

As part of the interim guidance, FHWA and UDOT will be developing a FAQ sheet and request that you submit questions that you have about Section 4(f). Your questions do not have to be limited just to the new regulations, but can include the old regulations and guidance as

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well. In order to provide you with the best guidance we can, we need to know what areas of Section 4(f) could be clarified. Please submit your questions to Betsy Skinner at [eskinner@utah.gov](mailto:eskinner@utah.gov) by April 23, 2008.

For those projects whose Section 4(f) chapters have been written or are being written, but whose environmental documents will not be approved before April 11, the Section 4(f) chapter will need to be reviewed to determine what changes will be required. Minimally, it will need to be updated with the new references and new regulatory language. Three specific areas in your documents that will need to be reviewed and evaluated are the following:

1. The determination that there is no “feasible and prudent avoidance alternative” as defined in 774.17. Be sure to check that the Section 4(f) evaluation considered the factors listed in subsections (2) and (3) of the definition. Keep in mind that the feasibility and prudence test applies only to alternatives that avoid Section 4(f) resources.
2. The definition of “all possible planning to minimize harm” is in 774.17. Be sure to check that your Section 4(f) evaluation considered the measures listed in the definition.
3. If all alternatives use 4(f) property and there is no feasible and prudent avoidance alternative, there must be a finding that the selected alternative “causes the least overall harm in light of the statute’s preservation purpose” (774.3(c)(1)). If your project requires this finding, be sure to check that your Section 4(f) evaluation documented consideration of the factors in 774.3(c)(1).

You are strongly encouraged to consult with the UDOT environmental staff and have them help you review and evaluate your Section 4(f) chapters, and to help you determine the process for implementing the new regulations before you begin a new chapter.

Thank you for your interest in Section 4(f).



## Section 4(f) Final Rule Fact Sheet

**Background:** Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109.59, amended existing Section 4(f) legislation at Section 138 of Title 23 and Section 303 of Title 49, United States Code, to simplify the processing and approval of projects that have only de minimis impacts on lands protected by Section 4(f). This is the first substantive revision of Section 4(f) legislation since the passage of the U.S. Department of Transportation Act of 1966.

SAFETEA-LU also, at 6009(c) required DOT to issue regulations that clarify the factors to be considered and the standards to be applied in determining feasibility and prudence of avoidance alternatives. The Federal Highway Administration and Federal Transit Administration initiated a Notice of Proposed Rulemaking (NPRM) to update the existing Code of Federal Regulations (23 CFR 771.135) pertaining to Section 4(f). This included revision to the current Section 4(f) regulations, in addition to incorporation of the Section 4(f) de minimis provision. The [FHWA/FTA De Minimis Impact Guidance](#) issued December 13, 2005 remains in effect.

### **The final rule modifies the procedures for granting Section 4(f) approvals in five ways:**

1. Clarifies the factors to be considered and the standards to apply when determining if an alternative for avoiding the use of a Section 4(f) property is feasible and prudent;
2. Clarifies factors to be considered when selecting a project alternative in situations where all alternatives would use some Section 4(f) property;
3. Establishes procedures for determining that the use of a Section 4(f) property has a *de minimis* impact on the property;
4. Updates the regulation to recognize statutory and common-sense exceptions for uses that advance Section 4(f)'s preservation purpose, as well as the option of applying a programmatic Section 4(f) evaluation;
5. Moves the Section 4(f) regulation out of 23 CFR 771.135 to its own place in 23 CFR 774 with a reorganized structure that is easier to use.

### **774.3 Section 4(f) Approvals:**

The Administration may not approve the use of a Section 4(f) property unless:

- no feasible and prudent avoidance alternative to use of land from property and;
- all possible planning to minimize harm to property; or
- de minimis impact on property
- the project meets the requirements of one of the approved programmatic Section 4(f) evaluations
- all coordination requirements have been met

### **Feasible and Prudent Avoidance Alternative:**

Feasible and Prudent Avoidance Alternative as defined in 774.17.

- Avoids the use of the Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property. In assessing the importance of protecting the Section 4(f) property, it is

appropriate to consider the relative value of the resource to the preservation of the statute.

- An alternative is not feasible if:
  - It cannot be built as a matter of sound engineering judgment.
- An alternative is not prudent if:
  - It results in unacceptable safety or operational problems;
  - Reasonable mitigation does not effectively address impacts;
  - It results in additional construction, maintenance, or operational costs of an extraordinary magnitude;
  - It causes other unique or unusual factors; or
  - It involves multiple factors listed above that while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.

#### Approval of Alternatives that use Section 4(f) property

When all alternatives result in the use of a Section 4(f) property and *if* there is no feasible and prudent avoidance alternative, *then* Administration *may approve only the alternative that* (emphasis added):

- causes the least overall harm given the statute's preservation purpose;
- determine least overall harm by balancing the following factors:
  - ability to mitigate adverse impacts to each Section 4(f) property (including those resulting in net benefits)
  - severity of remaining harm after mitigation to the protected activities, attributes, or features that qualify each property for Section 4(f) protection
  - significance of each Section 4(f) property
  - views of officials with jurisdiction over each Section 4(f) property
  - degree to which each alternative meets the purpose and need
  - magnitude of adverse impacts after reasonable mitigation
  - substantial difference in cost among alternatives

#### \*Determination of de minimis Impacts:

De Minimis Impact as defined in 774.17. De minimis impact means:

- For historic sites, no historic property is affected by the project or the project will have "no adverse effect" on the historic property in question.
- For parks, recreation areas, and wildlife and waterfowl refuges, impacts will not adversely affect the features, attributes, or activities qualifying the property for protection under Section 4(f).

\* See December 13, 2005 FHWA guidance memorandum: Guidance for determining De Minimis Impacts to Section 4(f) Resources.

#### Programmatic Section 4(f) Evaluations:

Programmatic Section (f) evaluations are developed by the Administration based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives. They cover a particular project only if specific conditions are met.

- The Administration may develop additional programmatic Section 4(f) evaluations as conditions warrant.

#### **774.5 Section 4(f) Coordination:**

Prior to making Section 4(f) approvals, the administration shall provide a minimum of 45 days for receipt of comments from officials with jurisdiction. If comments are not received within 15 days after the comment deadline, the administration may assume a lack of objection and proceed with the action.

- Coordination required prior to de minimis impact determinations
  - Historic Properties
    - Administration must receive written concurrence from SHPO, THPO, ACHP in finding of “no adverse effect” or no historic properties affected” in accordance with 36 CFR Part 800 before Administration can inform of intent to make a de minimis impact determination
  - Parks, Recreation Areas, & Wildlife and Waterfowl Refuges
    - public notice and opportunity for review and comment
    - officials with jurisdiction must be notified of Administration’s intent to make a de minimis impact determination, officials with jurisdiction must concur that project will not adversely affect what makes the Section 4(f) property eligible for protection

#### **774.7 Section 4(f) Documentation:**

- A Section (f) evaluation or a de minimis impact determination shall include sufficient information to demonstrate / support the finding and document that all required coordination has been completed.
- A Section 4(f) approval may involve different levels of detail where the Section 4(f) involvement is addressed in a tiered EIS.

#### **774.9 Section 4(f) Timing:**

- Potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study.

#### **774.11 Section 4(f) Applicability:**

Applicability separated into eight main subsections, including:

- Applicability of Section 4(f) to historic sites
- Interstate System and 4(f) applicability
- Applicability of Section 4(f) to archeological sites
- Applicability of Section 4(f) to Federal designated Wild & Scenic Rivers
- Applicability of Section 4(f) to property formally reserved for future transportation facility but temporarily being used as a Section 4(f) resource

#### **774.13 Section 4(f) Exceptions:**

Exceptions separated into seven main subsections, including:

- Restoration, rehabilitation, or maintenance of transportation facilities on or eligible for the National Register
- Archaeological sites that are on or eligible for the National Register
- Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites that are made, or determinations of significance that are changed, late in the development of the proposed action
- Temporary occupancies of land
- Park road or parkway projects under 23 U.S.C. 204
- Certain trails, paths, bikeways, and sidewalks
- Transportation enhancement projects and mitigation activities

#### **774.15 Section 4(f) Constructive Use Determinations:**

Constructive use determinations separated into six main subsections, including:

- If a project results in constructive use of Section 4(f) property, the administration shall evaluate use in accordance with §774.3
- Documentation required related to constructive use
- Basis upon which Constructive Use Determination is made (identification, analysis of proximity impacts, consultation)
- Situations when constructive use occurs
  - Interference with noise sensitive facility
  - Impairment of aesthetic features
  - Restriction of access
  - Vibration impact
  - Ecological intrusion
- Situations where constructive use does not occur
  - Compliance with the requirements of 36 CFR 800.5
  - FHWA Noise Abatement criteria
  - Projected noise level increases exceed relevant threshold , but are barely perceptible (3dBA or less)
  - Location of project established before designation, establishment, or change in the significance of the property
  - Combined proximity impacts do not substantially impair property
  - Proximity impacts mitigated to a condition equivalent, or better then which would occur if project not built
  - Change in accessibility does not substantially diminish utilization of the property
  - Vibration levels mitigated to levels that do not cause a substantial impairment to property

#### **774.17 Section 4(f) Definitions:**

Definitions contained in 23 U.S.C. 101(a) are applicable to this part. Additional definitions include Administration, All Possible Planning, De Minimis Impact, Feasible and Prudent Avoidance Alternative, & Use.